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The Criminal Continues to Go Free When the Constable Blunders: Testing the Boundaries of Curtilage—State V. Chute, 908 N.W.2D 578 (Minn. 2018)

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**THE CRIMINAL CONTINUES TO GO FREE WHEN THE
CONSTABLE BLUNDERS¹: TESTING THE BOUNDARIES OF
CURTILAGE—*STATE V. CHUTE*, 908 N.W.2D 578 (MINN.
2018)**

Akina Khan

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1. See *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.) (“The criminal is to go free because the constable has blundered.”).

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I. INTRODUCTION

The Minnesota Supreme Court recently held in *State v. Chute*² that evidence obtained without a warrant from a plain-sight investigation of a person's driveway, which is impliedly open to the public, is the result of an unreasonable search under the Fourth Amendment and, therefore, must be suppressed.³ Applying the *Dunn* factors,⁴ the majority found the driveway of a house to be within the house's curtilage, which is protected from unreasonable searches under the Fourth Amendment.⁵ Even though the driveway was impliedly open to the public and the police officer could reasonably surmise, from a plain view of the driveway, that it was storing a stolen camper, the majority held that the officer could not stay on the driveway to verify the camper's identity.⁶ The court decided to exclude all evidence regarding the stolen camper without considering that the officer would have inevitably discovered that the camper was stolen, even if he did not engage in any unlawful conduct.⁷

This case note begins by exploring the history of the right to be free from unreasonable searches by the government in America. In doing so, it visits the exclusionary rule—derived from the Fourth Amendment—and some of the relevant jurisprudence applying the exceptions and elaborations of the rule.⁸ This case note then discusses the facts and procedural history of *Chute*⁹ and explains the court's reasoning for its decision.¹⁰ Next, it argues that the court misapplied

2. 908 N.W.2d 578 (Minn. 2018).

3. *See id.* at 588.

4. *See* United States v. Dunn, 480 U.S. 294, 301 (1987) (“[1.] the proximity of the area claimed to be curtilage to the home, [2.] whether the area is included within an enclosure surrounding the home, [3.] the nature of the uses to which the area is put, and [4.] the steps taken by the resident to protect the area from observation by people passing by.”).

5. *Chute*, 908 N.W.2d at 583–85.

6. *See id.* at 585–88.

7. *See id.* at 588; *see also* discussion *infra* Section IV.B.

8. *See* discussion *infra* Part II.

9. *See* discussion *infra* Section III.A.

10. *See* discussion *infra* Section III.B.

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federal precedent,¹¹ missed an opportunity to apply the inevitable discovery rule,¹² and deviated from Minnesota's prior precedent in applying the exclusionary rule to the facts of *Chute*.¹³ This argument leads to the conclusion that the court's ruling will create unreasonable difficulties for prosecution in the future.¹⁴

II. HISTORY OF "UNREASONABLE SEARCH" UNDER THE FOURTH AMENDMENT

A. *The Fourth Amendment's Protection Against Unreasonable Searches*

The Fourth Amendment to the U.S. Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."¹⁵ A similar protection is found in Article 1, Section 10, of the Minnesota Constitution.¹⁶ Historically, the remedy available to a victim of an unreasonable search was limited to either self-help or commencing a suit for common-law trespass.¹⁷ Accordingly, until the twentieth century, evidence obtained from unreasonable searches could not be excluded under the Fourth Amendment.¹⁸

11. See discussion *infra* Section IV.A.

12. See discussion *infra* Section IV.B.

13. See discussion *infra* Section IV.C.–D.

14. See discussion *infra* Part V.

15. U.S. CONST. amend. IV.

16. See MINN. CONST. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.").

17. *Utah v. Strieff*, 136 S. Ct. 2056, 2060–61 (2016) (citing Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 625 (1999)) ("Because officers who violated the Fourth Amendment were traditionally considered trespassers, individuals subject to unconstitutional searches or seizures historically enforced their rights through tort suits or self-help.").

18. See *Collins v. Virginia*, 138 S. Ct. 1663, 1676 (2018) (Thomas, J., concurring) ("The exclusionary rule—the practice of deterring illegal searches and seizures by suppressing evidence at criminal trials—did not exist. No such rule existed in 'Roman Law, Napoleonic Law or even the Common Law of England.' And this Court did not adopt the federal exclusionary rule until the 20th century." (citations omitted)). Before the courts adopted the exclusionary rule, if evidence was "competent or pertinent," it would have been admitted, regardless of "the lawfulness or unlawfulness of the mode, by which it [was] obtained." *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 843–44 (C.C.D. Mass. 1822) (No. 15,551). The only limitation on the admissibility of such evidence was that the evidence could not be "created by

The U.S. Supreme Court first articulated the exclusionary rule, which renders evidence obtained through unreasonable searches inadmissible, in *Weeks v. United States*.¹⁹ The exclusionary rule was adopted to ensure judicial integrity and to “avoid even the slightest appearance of [the judiciary] sanctioning illegal government conduct.”²⁰ Although the *Weeks* exclusionary rule initially applied only in federal prosecutions that involved both state and federal law enforcement officers,²¹ it eventually expanded to “evidence seized by state law enforcement officers during a search that, if conducted by federal officers, would have violated the Fourth Amendment.”²² At that point, however, and at least up to 1949, “31 States rejected the *Weeks* doctrine, [and] 16 States [we]re in agreement with it.”²³ Finally, through *Mapp v. United States*, the Court ruled that “all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state

constraint, or oppression, such as confessions extorted by threats or fraud.” *See id.* at 844.

19. 232 U.S. 383, 391–94 (1914); *see also* *Wolf v. Colorado*, 338 U.S. 25, 28 (1949) (“In *Weeks v. United States*, . . . this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. This ruling was made for the first time in 1914. It was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication. Since then it has been frequently applied and we stoutly adhere to it.”), *overruled on other grounds by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

20. *United States v. Calandra*, 414 U.S. 338, 360 (1974) (Brennan, J., dissenting); *see also* *Terry v. Ohio*, 392 U.S. 1, 13 (1968) (“Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.”).

21. *See, e.g., Lustig v. United States*, 338 U.S. 74, 78–79 (1949) (plurality opinion) (applying the *Byars* doctrine to hold that the exclusionary rule applied because a federal agent had participated in the search); *Byars v. United States*, 273 U.S. 28, 32–34 (1927) (holding that because the federal agent participated in the wrongful search and seizure, the federal government could not “avail itself of evidence [that was] improperly seized”).

22. 2 DAVID S. RUDSTEIN, C. PETER ERLINDER, DAVID C. THOMAS, CRIMINAL CONSTITUTIONAL LAW § 11.02 n.38 (Matthew Bender 2018).

23. *Wolf*, 338 U.S. at 29.

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court.”²⁴ Thus, under *Mapp*, the exclusionary rule was derived from the constitutional protection afforded by the Fourth Amendment.²⁵

Although the U.S. Supreme Court generally allows the exclusion of evidence obtained from an unreasonable search in criminal proceedings,²⁶ the Court has questioned whether this suppression of evidence under the exclusionary rule is “a personal constitutional right.”²⁷ Because the rule is not found anywhere in the text of the Constitution, and “postdates the founding by more than a century,”²⁸ in *Davis v. United States*, the Court came to reject the “expansive dicta” in the line of cases suggesting that the exclusionary rule is “a self-executing mandate implicit in the Fourth Amendment itself.”²⁹ Instead, the Court, in *Davis*, recognized the exclusionary rule to be “a ‘judicially created remedy’ of this Court’s own making.”³⁰

Noting that the focus of the inquiry under the exclusionary rule should be on the “flagrancy of the police misconduct,” the Court has continued to apply the rule whenever justice so demands.³¹ This is

24. 367 U.S. at 655 (holding that the Fourth Amendment must be enforceable against the states “by the same sanction of exclusion as is used against the Federal Government,” providing deterrence and the insurance of judicial integrity as justification).

25. See *id.* at 655–56.

26. See, e.g., *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009) (holding that evidence collected from a strip search of a student at school was inadmissible due to the unreasonable method of the search); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (establishing evidence gathered from an indirect result of an unlawful search must be excluded); *Weeks v. United States*, 232 U.S. 383, 391–94 (1914) (finding that evidence collected without a search warrant based on probable cause is inadmissible).

27. *United States v. Calandra*, 414 U.S. 338, 348 (1974) (concluding that the exclusionary rule is a “remedial device” which does not “proscribe the use of illegally seized evidence in all proceedings or against all persons,” and must go through a “balancing process” weighing the efficacy of its “remedial objectives” against the “imposition of a criminal sanction on the victim of the search”).

28. *Collins v. Virginia*, 138 S. Ct. 1663, 1677 (2018) (Thomas, J., concurring) (citations omitted).

29. 564 U.S. 229, 237–38 (2011) (rejecting the “expansive dicta” that derived the exclusionary rule implicitly from the Fourth Amendment in: *Mapp*, 367 U.S. at 655; *Olmstead v. United States*, 277 U.S. 438, 462 (1928)).

30. *Id.* at 238 (quoting *Calandra*, 414 U.S. at 348). For a discussion of this distinction between the exclusionary rule being a judicially created doctrine versus a personal, constitutional right, see discussion *infra* Section IV.A.2.

31. See *id.* (“When the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively

grounded in principles of due process and protection of an individual's legitimate and reasonable expectations of privacy.³² Still, what constitutes an unreasonable search remains a gray, and sometimes contradictory, area of Fourth Amendment jurisprudence.³³

B. *The Open-Fields Doctrine*

Although the unreasonableness of a search of an individual's person or property is a heavily litigated topic, certain areas and circumstances clearly fall outside the scope of the Fourth Amendment's protection. State intrusions and searches on "open fields" are not protected by the Fourth Amendment because it is not reasonable to have expectations of privacy in open fields.³⁴ Thus, an officer can enter and search an open field without a warrant.³⁵

reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way." (citations and internal quotation marks omitted)).

32. See *Oliver v. United States*, 466 U.S. 170, 187 (1984) (Marshall, J., dissenting) ("The liberty shielded by the Fourth Amendment, as we have often acknowledged, is freedom from unreasonable government intrusions into . . . legitimate expectations of privacy." (citation and internal quotation marks omitted)); *United States v. Chadwick*, 433 U.S. 1, 7 (1977); *Katz v. United States*, 389 U.S. 347, 361–62 (1967) (Harlan, J., concurring).

33. See generally Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (criticizing the Supreme Court's Fourth Amendment jurisprudence and proposing an alternative approach to the amendment's interpretation and application).

34. See *Oliver*, 466 U.S. at 179; *Katz*, 389 U.S. at 361 (Harlan, J., concurring) ("[A] man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited."); *Hester v. United States*, 265 U.S. 57, 58 (1924) (holding that revenue officers could lawfully enter defendant's open fields to observe him selling liquor illegally).

35. *Oliver*, 466 U.S. at 173, 184 (finding a marijuana field, located a mile from petitioner's home and surrounded by "No Trespassing" signs, to be an open field where the protection of the Fourth Amendment did not reach).

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1. *Origins of the Open-fields Doctrine*

The open-fields doctrine finds its origin in *Hester v. United States*,³⁶ where the U.S. Supreme Court held there was no seizure of a jug containing illegally distilled moonshine whiskey—obtained and examined without a warrant by officers on land belonging to defendant’s father—because the jug was in an “open field” to which Fourth Amendment protection did not extend.³⁷ Then, in *Oliver v. United States* (the seminal U.S. Supreme Court decision regarding the open-fields doctrine), the Court went so far as to hold that government intrusion in an individual’s property open to the public does not even constitute a search within the meaning of the Fourth Amendment, even if that intrusion would constitute common-law trespass.³⁸ The *Oliver* Court also explained that an area does not need to be “‘open’ nor a ‘field’ as those terms are used in common speech,” to be considered an open field for purposes of the Fourth Amendment.³⁹

Furthermore, the *Oliver* Court reasoned against adopting a case-by-case approach to determine whether an area is an open field because of the difficulties and complications posed by such an ad hoc analysis to the practical needs of law enforcement officers.⁴⁰ Rather, the Court expounded some crucial factors that have historically assisted courts in determining whether there can be a reasonable expectation of privacy in a given location, without giving too much

36. *United States v. Williams*, No. 1:17-CR-41, 2017 WL 3528955, at *2 (E.D. Tex. July 27, 2017) (“The ‘open fields’ doctrine, [was] first enunciated by the Supreme Court in *Hester v. U.S.*” (citation omitted)).

37. 265 U.S. at 59 (“[T]he special protection accorded by the Fourth Amendment to the people in their ‘persons, houses, papers, and effects,’ is not extended to the open fields. The distinction between the latter and the house is as old as the common law.”).

38. *Oliver*, 466 U.S. at 183–84.

39. *Id.* at 180 n.11.

40. *Id.* at 181–82 (“The ad hoc approach not only makes it difficult for the policeman to discern the scope of his authority, . . . it also creates a danger that constitutional rights will be arbitrarily and inequitably enforced.” (citation omitted)); see also *New York v. Belton*, 453 U.S. 454, 458–60 (1981) (“A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field.” (citations and internal quotations marks omitted)); *Robbins v. California*, 453 U.S. 420, 430 (1981) (Powell, J., concurring); *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979); *United States v. Robinson*, 414 U.S. 218, 235 (1973).

weight to any one factor.⁴¹ Ultimately, these factors have guided the Court in identifying a location as an open field that falls outside the scope of the Fourth Amendment's protection.⁴²

2. Justification for the Open-fields Doctrine

The rationale for the open-fields doctrine is that law enforcement officials enjoy the same right of access to open fields as does the public.⁴³ Additionally, the Court has determined it would be unreasonable to uphold privacy rights for the specific purposes of the Fourth Amendment where otherwise there is no discernible expectation of privacy.⁴⁴ This is consistent with the historical understanding of the Fourth Amendment's standard of protection, that the Amendment's protections are rooted in a person's "reasonable expectation of privacy."⁴⁵ And because "open fields do not provide the setting for those intimate activities [that warrant a legitimate need for privacy] that the Amendment is intended to shelter from government interference or surveillance," evidence obtained from open fields is generally admissible.⁴⁶

This focus on reasonable expectation of privacy derives primarily from the Court's landmark decision in *Katz v. United States*, where the reasonable-expectation-of-privacy test originated.⁴⁷ *Katz* also is well known for holding that because "the Fourth Amendment protects people, not places," the characterization of an *area* as constitutionally

41. *Oliver*, 466 U.S. at 178 ("In assessing the degree to which a search infringes upon individual privacy, the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, e.g., *United States v. Chadwick*, 433 U.S. 1, 7–8 (1977), the uses to which the individual has put a location, e.g., *Jones v. United States*, 362 U.S. 257, 265 (1960), and our societal understanding that certain areas deserve the most scrupulous protection from government invasion, e.g., *Payton v. New York*, 445 U.S. 573 (1980). These factors are equally relevant to determining whether the government's intrusion upon open fields without a warrant or probable cause violates reasonable expectations of privacy and is therefore a search proscribed by the Amendment.").

42. *See id.*

43. *Id.* at 177–81.

44. *Id.*

45. *See Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); *see also Oliver*, 466 U.S. at 177, 180.

46. *See Oliver*, 466 U.S. at 179, 182–83 ("The test of legitimacy [of privacy] is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.").

47. *See Katz*, 389 U.S. at 361–62 (Harlan, J., concurring).

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protected is insufficient, and the focus of the inquiry should be on what an *individual* “seeks to preserve as private, even in an area accessible to the public.”⁴⁸ Justice Harlan, however, pointed out in his concurrence that a person’s expectation of privacy is inextricably connected to a place.⁴⁹

More importantly, Justice Harlan’s concurrence provided a twofold test for determining which places may fall within a person’s expectation of privacy.⁵⁰ The *Katz* reasonable-expectation-of-privacy test, still relied on by courts today, permits privacy to be warranted wherever “[1.] a person ha[s] exhibited an actual (subjective) expectation of privacy and, . . . [2.] [where] the expectation [is] one that society is prepared to recognize as ‘reasonable.’”⁵¹ Essentially, the test asks the court to “balance a defendant’s diminished privacy interest against the government’s legitimate interest” in needing to conduct a warrantless search.⁵²

The *Katz* test directly lends its way into the holding of *Oliver v. United States* regarding open fields.⁵³ Specifically, *Oliver* relied on *Katz* in holding that “in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment,” because the right to exclude others from one’s property “vindicates no legitimate privacy interest.”⁵⁴ Thus, “no expectation of privacy legitimately attaches to open fields.”⁵⁵ Consequently, evidence obtained from open fields, to which law enforcement officers enjoy an equal right of access as the public, is not the fruit of an unreasonable search or seizure.

48. See *id.* at 351–52 (finding that an individual who enters and shuts the door of a telephone booth—despite its public nature and visibility—is constitutionally “entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world”).

49. *Id.* at 361 (Harlan, J., concurring) (“Generally, as here, the answer to th[e] question [of what protection the Fourth Amendment affords the people] requires reference to a ‘place.’”).

50. *Id.*

51. *Id.*

52. *United States v. Perez*, 440 F. Supp. 272, 276 (N.D. Ohio 1977); see also *United States v. Davis*, 785 F.3d 498, 517–18 (11th Cir. 2015) (applying the balancing to hold that the defendant “had no reasonable expectation of privacy in business records made, kept, and owned by” the telephone company, and the stored telephone records produced in the case served “compelling governmental interests”).

53. See 466 U.S. 170, 180–81 (1984).

54. *Id.* at 183–84.

55. *Id.* at 180.

C. *Evolution of the Curtilage Analysis and the Dunn Factors*

While the open fields neighboring a person's home may not be protected by the Fourth Amendment, one of the main beneficiaries of the Fourth Amendment's protection is a person's house or area of dwelling. This protection is based on the age-old recognition of and respect for the reasonable expectation of privacy in one's home.⁵⁶ Moreover, the Fourth Amendment's protection applies with full force to "land immediately surrounding and associated with the home" that the Court considers "curtilage."⁵⁷ This is because curtilage has been treated as part of the house where there can be a reasonable expectation of privacy.⁵⁸ Thus, the notion of curtilage acts as a limitation to the open-fields doctrine by carving out an area of Fourth Amendment protection from the open fields that are unprotected by the Fourth Amendment.

1. *Origins and Evolution of the Curtilage Analysis*

As with many other aspects of American jurisprudence, the concept of curtilage draws its origins from the common law of England, and was initially applied by American courts in the context of burglary statutes.⁵⁹ Curtilage found its way into the protection of

56. See *Katz*, 389 U.S. at 361 (Harlan, J., concurring) ("[A] man's home is, for most purposes, a place where he expects privacy."); *Boyd v. United States*, 116 U.S. 616, 626-30 (1886).

57. *Oliver*, 466 U.S. at 180 ("[T]he common law distinguished 'open fields' from the 'curtilage' . . . The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home.").

58. See *id.* ("At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,' . . . and therefore has been considered part of the home itself for Fourth Amendment purposes." (quoting *Boyd*, 116 U.S. at 630)).

59. See, e.g., *United States v. Dunn*, 480 U.S. 294, 300 (1987) ("The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself."); *Bare v. Commonwealth*, 94 S.E. 168, 172 (Va. 1917) ("In England the curtilage seems to have included only the buildings within the inner fence or yard, because there, in early times, for defense, the custom was to enclose such place with a substantial wall. In this country, however, such walls or fences, in many cases, do not exist, so that with us the curtilage includes the cluster of buildings constituting the habitation or dwelling place, whether enclosed with an inner fence or not."); *Wright v. State*, 77 S.E. 657, 658 (Ga. Ct. App. 1913) (discussing curtilage in the context of an English burglary statute and advocating to include a house's curtilage within the scope of Georgia's burglary statute).

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the Fourth Amendment through *Amos v. United States*.⁶⁰ The Court in *Amos* granted the defendant's petition to exclude evidence obtained from "a search of [the] defendant's house and store 'within his curtilage,'" because the search was "made unlawfully and without warrant of any kind, in violation of his rights under the Fourth and Fifth Amendments."⁶¹

At the time *Amos* was decided, and until the Court issued its decision in *Oliver*, the curtilage analysis included only physical structures and not the ground or yard surrounding a house.⁶² Through *Oliver*, the Court provided an updated, modern version of the curtilage rule, which expanded the Fourth Amendment's protection of the curtilage from physical structures surrounding the house to the ground or yard immediately surrounding the house, regardless of the existence of physical structures on the ground or yard.⁶³ Although, in *Oliver*, the Court distinguished the field on which the marijuana was grown as an open field, outside the curtilage, the Court's explanation of curtilage did not stay limited to physical structures, as it repeatedly referred to curtilage as an "area," and not merely a structure.⁶⁴ Since *Oliver*, the notion of curtilage has continued to include the area immediately surrounding the house where a person can reasonably have an expectation of privacy under *Katz*'s twofold reasonable-expectation-of-privacy standard.⁶⁵

60. 255 U.S. 313, 314 (1921).

61. *Id.*

62. Brendan Peters, Note, *Fourth Amendment Yard Work: Curtilage's Mow-Line Rule*, 56 STAN. L. REV. 943, 954–55 (2004) (providing as examples of Supreme Court cases between *Amos* and *Oliver*: *Olmstead v. United States*, 277 U.S. 438, 466 (1928); *Scher v. United States*, 305 U.S. 251, 255 (1938); *Trapper v. North Carolina*, 451 U.S. 997, 999 (1981)).

63. See *Oliver*, 466 U.S. at 180, 183–84.

64. *Id.*; see also Peters, *supra* note 62, at 956 ("The Court's mention of the curtilage under *Oliver*'s facts suggests that had the marijuana been growing in the house's curtilage (lawn), the warrantless search would have violated the Fourth Amendment and the evidence would have been suppressed.").

65. See, e.g., *Dow Chemical Co. v. United States*, 476 U.S. 227, 235 (1986) ("The curtilage area immediately surrounding a private house has long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept."); *United States v. Karo*, 468 U.S. 705, 715 (1984) (finding that because an electronic beeper tracked information that the government "could not have obtained by observation from outside the curtilage of the house," the information from the beeper was obtained through an unreasonable search).

2. United States v. Dunn and the Dunn Factors

Although the Court in *Oliver* anticipated the curtilage analysis to be fairly straightforward “for most homes,”⁶⁶ as more and more cases concerning curtilage appeared within the Court’s dominion, the curtilage inquiry—especially regarding the physical boundaries and scope of the curtilage—inevitably became more complicated.⁶⁷ When the boundaries of curtilage were not as clearly marked as the *Oliver* Court had supposed, the extent-of-curtilage inquiry relied on the *Katz* reasonable-expectation-of-privacy test.⁶⁸ Until *United States v. Dunn* in 1987, the Court’s analysis of where reasonable privacy existed for curtilage purposes was limited to the *Katz* reasonable-expectation-of-privacy test and the open-fields doctrine.⁶⁹

While *Dunn* delineated what is not considered curtilage, it also laid out the four factors that courts use to determine the curtilage of a house.⁷⁰ The four *Dunn* factors are:

[1.] the proximity of the area claimed to be curtilage to the home, [2.] whether the area is included within an enclosure surrounding the home, [3.] the nature of the uses to which the area is put, and [4.] the steps taken by the resident to protect the area from observation by people passing by.⁷¹

66. See *Oliver*, 466 U.S. at 182 n.12 (“[F]or most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience. The occasional difficulties that courts might have in applying this, like other, legal concepts, do not argue for the unprecedented expansion of the Fourth Amendment [to open fields as] advocated by the dissent.”).

67. See Peters, *supra* note 62, at 945 (“[T]he curtilage’s boundary was not as clearly marked as the Court thought.”).

68. See *California v. Ciraolo*, 476 U.S. 207, 211–14 (1986) (applying the *Katz* reasonable-expectation-of-privacy test to hold that defendant’s “expectation that his [marijuana] garden [within the physical curtilage of his home] was protected from such observation [by the police from public airspace] is unreasonable and is not an expectation that society is prepared to honor”); see also *California v. Rooney*, 483 U.S. 307, 319–26 (1987) (holding that defendant’s trashcan, although physically within the curtilage of his home, did not fall within the curtilage because defendant had no reasonable expectation of privacy in his trashcan); *supra* note 66.

69. See *United States v. Dunn*, 480 U.S. 294, 301 (1987) (holding that the Fourth Amendment protections afforded to defendant’s house could not be expanded to include the area surrounding the barn because the area surrounding the barn did not lie within the curtilage of defendant’s ranch house).

70. See *id.*

71. *Id.*

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Together, these four factors pose the central question for any curtilage determination: “whether the area in question is so intimately tied to the home itself that it should be placed under the home’s ‘umbrella’ of Fourth Amendment protection.”⁷²

Whereas the *Oliver* Court prescribed against a case-by-case analysis of the curtilage inquiry, the *Dunn* Court expressly advocated for such an analysis.⁷³ In *Dunn*, the Court considered the typical use of a barn.⁷⁴ The Court had two options: follow *Oliver* and refuse to do a case-by-case analysis by adopting the general rule that a barn is in domestic use,⁷⁵ or perform a case-specific analysis and determine that the barn-in-question was “not being used for intimate activities of the home,” and hence was not in the curtilage.⁷⁶ Despite Justice Brennan’s dissenting argument, the majority in *Dunn* chose the latter, case-by-case analysis.⁷⁷ Consequently, the Court declined to adopt a bright-line rule limiting the boundaries of curtilage to “extend no farther than the nearest fence surrounding a fenced house” and reiterated that “the primary focus [should be] whether the area in question harbors those intimate activities associated with domestic life and the privacies of the home.”⁷⁸

Since *Dunn*, the notion of curtilage has continued to evolve and has even gained a vertical dimension where government surveillance from airspace has been questioned as an unreasonable intrusion into privacy protected by the Fourth Amendment.⁷⁹ Instead of applying

72. *Id.*

73. *See id.* at 310–12 (Brennan, J., dissenting).

74. *See id.* at 302–03.

75. *Id.* at 310 (Brennan, J., dissenting).

76. *Id.* at 302–03.

77. *See id.* at 302–03; *id.* at 310–12 (Brennan, J., dissenting).

78. *Id.* at 301 n.4 (“Application of the Government’s ‘first fence rule’ might well lead to diminished Fourth Amendment protection in those cases where a structure lying outside a home’s enclosing fence was used for such domestic activities. And, in those cases where a house is situated on a large parcel of property and has no nearby enclosing fence, the Government’s rule would serve no utility; a court would still be required to assess the various factors outlined above to define the extent of the curtilage.”).

79. *See Florida v. Riley*, 488 U.S. 445, 447–48 (1989) (holding that “surveillance of the interior of a partially covered greenhouse in a residential backyard from the vantage point of a helicopter located 400 feet above the greenhouse” does not constitute “a ‘search’ for which a warrant is required under the Fourth Amendment”); *see also California v. Ciraolo*, 476 U.S. 207, 211–14 (1986) (holding that the warrantless aerial observation of a backyard, within curtilage, was not a Fourth Amendment violation).

the *Dunn* factors, which are more suited for the horizontal, ground curtilage inquiry, the Court, once again, found *Katz*'s reasonable-expectation-of-privacy test to lend the necessary guidance.⁸⁰ The two major U.S. Supreme Court cases in the area of vertical curtilage—*Florida v. Riley* and *California v. Ciraolo*—agreed that the defendants satisfied the first prong of the *Katz* test by establishing a subjective expectation of privacy in the areas surveilled but had failed to show the second prong that “such an expectation [of privacy] was . . . reasonable and . . . one that ‘society is prepared to honor.’”⁸¹

D. Interpretation of Curtilage in Minnesota

Minnesota acknowledges that the open-fields doctrine allows government officials to access any location that is not someone's private home or the home's curtilage.⁸² Minnesota has also adopted the *Dunn* factors to determine which areas surrounding a home fall within the curtilage.⁸³ Before the U.S. Supreme Court decided *Dunn*, the Minnesota Supreme Court used the open-fields analysis and the *Katz* reasonable-expectation-of-privacy test to hold that areas surrounding a house that are impliedly open to the public, such as an open driveway, do not fall within the curtilage of the house.⁸⁴ With the emergence of the *Dunn* factors and prior cases dealing with curtilage, the general interpretation of curtilage in Minnesota has revolved around the determination of whether police officers “restrict their movements to places visitors could be expected to go (e.g., walkways,

80. See *Riley*, 488 U.S. 445 at 449; *Ciraolo*, 476 U.S. at 214.

81. *Riley*, 488 U.S. 445 at 449 (quoting *Ciraolo*, 476 U.S. at 214).

82. *State v. Sorenson*, 441 N.W.2d 455, 460 (Minn. 1989) (“The term ‘open field’ has been construed to apply not only to an open field in a literal sense, but also to wooded areas, deserts, vacant lots in urban areas, open beaches, reservoirs and open waters. This broad definition, along with the expansion of the doctrine in *Oliver*, appears to permit government intrusion anywhere except homes, the curtilage of homes and other areas in which a reasonable expectation of privacy can be proven.” (citation omitted)).

83. See *State v. Chute*, 908 N.W.2d 578, 584 (Minn. 2018); *State v. Carter*, 569 N.W.2d 169, 177 (Minn. 1997); *Sorenson*, 441 N.W.2d at 458. See generally 42 DUNNELL MINN. DIG., *Search and Seizure* § 1.01 (2017).

84. See *United States v. Dunn*, 480 U.S. 294, 301 (1987); *Katz v. United States*, 389 U.S. 347, 361 (1967); *State v. Crea*, 305 Minn. 342, 345–47, 233 N.W.2d 736, 739–40 (1975) (holding police intrusion onto an open driveway to examine the “trailers which were in plain sight” was not an intrusion into the home's curtilage).

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driveways, porches).”⁸⁵ Thus, in Minnesota, open driveways,⁸⁶ hallways outside apartment units where the landlord has given access to law enforcement,⁸⁷ and walkways and porches where visitors are expected to roam⁸⁸ are reasonable places for law enforcement to conduct a search, regardless of whether they fall within the definition of curtilage.

III. THE *CHUTE* DECISION

A. *Facts and Procedural Posture*

On October 22, 2011, from County Road D in Maplewood, Minnesota, B.F. noticed his stolen camper parked on Defendant Quentin Chute’s dirt driveway.⁸⁹ B.F. had reported his camper stolen in July 2011.⁹⁰ After spotting the camper on Chute’s driveway, B.F. made a U-turn on County Road D so that he could get another look at the camper and verify it as his.⁹¹ Having reasonably convinced himself that it was indeed his camper on the driveway, B.F. then notified the police of his discovery.⁹² An officer joined B.F. at the end of Chute’s

85. *State v. Krech*, 403 N.W.2d 634, 637 (Minn. 1987) (citation omitted) (holding that the police did not violate defendant’s Fourth Amendment rights in entering his land to seize the abandoned property in garbage because defendant did not have a reasonable, or even an actual, expectation that the area where the garbage cans were located would be treated as protected under the Fourth Amendment). *See generally Dunn*, 480 U.S. 294; *Crea*, 305 Minn. 342, 233 N.W.2d 736.

86. *Crea*, 305 Minn. at 346, 233 N.W.2d at 739.

87. *State v. Edstrom*, 916 N.W.2d 512, 520–21 (Minn. 2018) (holding that because the police had the landlord’s permission to be in the hallway of defendant’s apartment unit, and because there was a reasonable suspicion of criminal activity where defendant had no reasonable expectation of privacy, the dog-sniff conducted by the police in the hallway did not constitute a search within the meaning of the Fourth Amendment).

88. *Krech*, 403 N.W.2d at 637 (concluding that the defendant had no reasonable expectation of privacy in the garbage bags and the discarded shipping box that he had abandoned, even though they were in areas of defendant’s residence where he may not have granted permission for the public to be). “[P]olice do not need a warrant or even probable cause to approach a dwelling in order to conduct an investigation if they restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches).” *Id.* (internal quotation marks omitted).

89. *State v. Chute*, 887 N.W.2d 834, 839 (Minn. Ct. App. 2016), *aff’d*, 908 N.W.2d 578 (Minn. 2018).

90. *Chute*, 908 N.W.2d at 581.

91. *Id.*

92. *Id.*

dirt driveway and confirmed, while standing on County Road D, that the camper was of the same make and model as that of the camper reported stolen by B.F.⁹³

After B.F. told the officer about the unique set of bolts B.F. had installed on the camper, which had initially helped him identify the camper as his, the officer wanted to affirmatively ensure that the camper on Chute's dirt driveway did in fact belong to B.F.⁹⁴ Accordingly, both the officer and B.F. walked down the dirt driveway toward the camper.⁹⁵ Although the camper's license plate and vehicle identification number (VIN) had been removed, the officer was able to identify a partial VIN on the camper after speaking to the manufacturer of the camper over the phone. The partial VIN of the camper on the driveway matched that of B.F.'s stolen camper.⁹⁶ At that point, the officer entered the camper to find B.F.'s personal items inside.⁹⁷

With the foregoing discovery, the officer started walking on the driveway to approach the back of Chute's home and eventually knocked on Chute's garage in the backyard.⁹⁸ Chute answered to inform the officer that he had been storing the camper for a friend.⁹⁹ After noticing some more personal property from the camper in Chute's garage, the officer asked to search the property, and Chute consented to the search of his home and garage after some discussion.¹⁰⁰ The search revealed even more stolen property from the camper on Chute's property.¹⁰¹

Pursuant to section 609.53, subdivision 1, and section 609.52, subdivision 3(3)(a), of the Minnesota Statutes, the State of Minnesota charged Chute with receiving and possessing stolen property.¹⁰² Claiming that the officer's presence on his property constituted an "unlawful search," Chute moved to suppress all evidence from the search, pursuant to the exclusionary rule.¹⁰³ The district court denied the motion, holding that the officer "had a lawful right of access to the

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Chute*, 887 N.W.2d at 839.

100. *Id.*

101. *Id.*

102. *Chute*, 908 N.W.2d at 582.

103. *Chute*, 887 N.W.2d at 843.

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camper” because the driveway was “impliedly open to the public.”¹⁰⁴ Consequently, the district court refused to suppress the evidence found from the officer’s presence on Chute’s driveway and convicted Chute of the charges brought against him.¹⁰⁵

The Minnesota Court of Appeals, however, reversed the district court’s denial of Chute’s motion to suppress.¹⁰⁶ The Minnesota Supreme Court affirmed, holding the officer’s entry into Chute’s driveway, for the purpose of examining the camper, to be outside the scope of the implied license to the driveway that Chute may have granted to the public.¹⁰⁷ On that basis, the court found the officer’s conduct constituted a trespassory search, which also tainted Chute’s later consent to a search of his garage and house.¹⁰⁸ The Minnesota Supreme Court granted Chute’s motion to suppress the evidence obtained from his driveway and vacated his conviction for lack of evidence.¹⁰⁹

B. The Minnesota Supreme Court’s Decision

To arrive at its conclusion that the officer had conducted an unlawful search on Chute’s property, the Minnesota Supreme Court first had to decide whether the officer’s conduct constituted a “search” under the Fourth Amendment. The court concluded that the officer performed a search on Chute’s property because the officer was “trespassing upon one of the kinds of property enumerated in the Fourth Amendment;” specifically, he was trespassing upon Chute’s house.¹¹⁰ Because it was a search under the Fourth Amendment, the officer needed a warrant to be on Chute’s property, unless an exception, like the knock-and-talk exception,¹¹¹ to the requirement for a warrant applied.¹¹²

The court applied the four *Dunn* factors to hold that the driveway, where the officer was alleged to have conducted his search, was

104. *Chute*, 908 N.W.2d at 582.

105. *Id.*

106. *Chute*, 887 N.W.2d at 847.

107. *Chute*, 908 N.W.2d at 588.

108. *Id.*

109. *Id.*

110. *Id.* at 583 (citing *United States v. Jones*, 565 U.S. 400, 404–05, 411 (2012)).

111. The knock-and-talk exception involves “knocking on the door and seeking to speak to an occupant for the purpose of gathering evidence.” *Id.* (citing *Florida v. Jardines*, 569 U.S. 1, 21 (2013)).

112. *Id.*

within the curtilage of Chute's home wherein Chute had a reasonable expectation of privacy to not be subject to a warrantless search.¹¹³ However, because Chute had impliedly allowed the public to use his driveway to access the back entrance of his house, the officer had an implied license to be on the driveway.¹¹⁴ Nevertheless, the court held that the scope of the officer's implied license was limited to the specific purpose of accessing the back entrance.¹¹⁵ Although the officer had the right to be on Chute's driveway to access the back entrance, without the requisite warrant, he did not have the license to investigate the camper on the driveway.¹¹⁶

Moreover, the court found that the knock-and-talk exception to a warrantless search did not apply because the officer did not enter Chute's driveway with the narrow intention of knocking on Chute's door to obtain his consent to a search.¹¹⁷ All of this led the court to conclude that the evidence obtained from the officer's investigation of the camper on Chute's property, and all other foregoing findings, should be suppressed as called for by the exclusionary rule.¹¹⁸

IV. ANALYSIS

A. Chute Erred in Applying the Scope of the Implied Public License

The majority in *Chute* erred by holding that the officer's search of the camper on Chute's driveway was unreasonable because the officer had exceeded the scope of the implied license to be on the driveway.¹¹⁹ The majority should have found that because the officer had an implied license to be on Chute's driveway and had a strong, prior indication that the camper on the driveway belonged to B.F. (from the officer's observation and B.F.'s description of the stolen camper), under *State v. Crea* and subsequent Minnesota precedent, the officer had the right to examine the camper on the driveway to make sure it was indeed the one stolen from B.F.¹²⁰

113. *Id.* at 583–85.

114. *Id.* at 586–88.

115. *Id.*

116. *Id.*

117. *Id.* at 586–87.

118. *See id.* at 588.

119. *See id.*

120. *See State v. Crea*, 305 Minn. 342, 346, 233 N.W.2d 736, 739–40 (1975) (“The police had a right to walk onto the driveway because it was an area of the curtilage impliedly open to use by the public. They would have had to walk on it in order to get

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1. *The Meaning and Scope of the Implied Public License to Curtilage*

American social norms have long implied that the owner of a house gives permission to the public to access the area leading up to the house for the purpose of knocking on the door and seeking the residents.¹²¹ Spatially, this implicit license may extend to the porch,¹²² an open garage,¹²³ the driveway leading up to the home's entrance,¹²⁴ and parts of the curtilage that provide a pathway to the house. Just as members of the public have an implied license to access these limited parts of the curtilage, so do police officers without warrants.¹²⁵

In addition to the spatial boundaries of the implied public license, there also is a purpose-limitation to the scope of the implied public license to a home's curtilage.¹²⁶ The socially acceptable purpose for exercising the implied public license is to gain a pathway to the entrance of the house from where the licensee can knock to obtain further access into the house.¹²⁷ This is consistent with the general notion of a license—a license obtained for a specific purpose cannot be extended to purposes outside the scope of the license. For example, if an owner gives someone a license to clean the basement of a house, rummaging through the boxes in the basement would be beyond the scope of the license, and hence, unlawful. Applied to a police officer, the implied public license gives an officer the permission to access a home's curtilage to “approach a home, knock on the front door, and

to the house so that they could knock on the door to talk with defendant. Thus, they had a right to be in the place from which they viewed the first trailer. Having viewed the trailer in plain sight, they had a right to examine it to determine whether it was the stolen trailer.”).

121. *Florida v. Jardines*, 569 U.S. 1, 8 (2013) (“A license may be implied from the habits of the country . . .” (quoting *McKee v. Gratz*, 260 U.S. 127, 136 (1922))); *United States v. Holmes*, 143 F. Supp. 3d 1252, 1258 (M.D. Fla. 2015) (“In America, an ‘implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.’” (quoting *Jardines*, 569 U.S. at 8))).

122. *See Holmes*, 143 F. Supp. 3d at 1260.

123. *See Tracht v. Comm’r of Pub. Safety*, 592 N.W.2d 863, 864–65 (Minn. Ct. App. 1999).

124. *See Crea*, 305 Minn. at 346, 233 N.W.2d at 739–40.

125. *See Jardines*, 569 U.S. at 8.

126. *See id.* at 9 (“The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose.”).

127. *Id.*

ask to speak with the occupants.”¹²⁸ This right of the police is commonly known as the knock-and-talk exception to the requirement for a search warrant.¹²⁹

The U.S. Supreme Court, in *Florida v. Jardines*, ruled that the implied license to approach a home to knock on its door does not allow a police officer to conduct a search of the home, even from the outside area, which the officer has an implied license to access.¹³⁰ In *Jardines*, the officer arrived on the defendant’s porch, where he was physically allowed to be under the implied license.¹³¹ The officer, however, was not on the porch for a knock-and-talk.¹³² Rather, his purpose was to conduct a search of what was going on inside defendant’s home, from the porch, with the aid of a drug-sniffing dog.¹³³ In determining whether the officer exercised his implied public license to the home’s curtilage for the impermissible purpose of conducting a search, the Court noted that “the subjective intent of the officer is irrelevant.”¹³⁴ If the officer’s “behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do,” then the officer’s presence and conduct on the curtilage exceeds the scope of the implied license.¹³⁵

In Minnesota, “police with legitimate business may enter areas within the curtilage of the home if those areas are impliedly open to the public.”¹³⁶ The permissible purpose of the police’s entry, in Minnesota, is mostly congruent with that from *Jardines*. The police may, without a warrant, enter the curtilage to approach the home and conduct a knock-and-talk to question the homeowner.¹³⁷ The only difference is that in Minnesota, under *State v. Crea*, police officers are expressly permitted to “keep their eyes open and use their other senses” while exercising their implied license to be on the curtilage.¹³⁸

128. *United States v. Carlloss*, 818 F.3d 988, 990 (10th Cir. 2016).

129. *See State v. Chute*, 908 N.W.2d 578, 581 n.1 (Minn. 2018).

130. 569 U.S. at 9–10.

131. *Id.* at 3.

132. *Id.* at 3–4.

133. *Id.* at 8–9.

134. *Id.* at 10 (citing *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011); *Whren v. United States*, 517 U.S. 806 (1996)).

135. *Id.*

136. *State v. Chute*, 887 N.W.2d 834, 841 (Minn. Ct. App. 2016) (citing *State v. Crea*, 305 Minn. 342, 346, 233 N.W.2d 736, 739 (1975)), *aff’d*, 908 N.W.2d 578 (Minn. 2018).

137. *See id.* at 840.

138. *See Crea*, 305 Minn. at 346, 233 N.W.2d at 739.

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Crea's holding, that police officers "in such a situation . . . are free to keep their eyes open and use their other senses,"¹³⁹ is long-standing and finds its way into recent Minnesota cases, including *Chute*.¹⁴⁰

2. *Chute Likely Did Not Have to Follow Jardines*

The *Chute* court correctly held that because the driveway provided access to the house's back door, Chute had given the public an implied access to his driveway.¹⁴¹ Under both federal and state law, this implied public license also provided the officer with a license to be on the driveway.¹⁴² The Minnesota Supreme Court relied on *Florida v. Jardines* to determine that an officer is limited by the purpose of an implied license when he enters the curtilage of a home.¹⁴³ The court, however, erred in holding that the scope of the license's purpose, as it applied to the officer in the instant case, was limited to only using the driveway to access the back door to seek Chute for further investigation.¹⁴⁴ Specifically, the court found that the officer utilized his implied license for an improper purpose because the officer did not enter the driveway for the sole purpose of reaching the back door and had, instead, examined the camper on the driveway before knocking on Chute's door.¹⁴⁵

The Minnesota Court of Appeals justified its decision¹⁴⁶ to follow *Jardines* by citing to the binding nature of U.S. "Supreme Court precedent on matters of federal law, including the interpretation and

139. *Id.*

140. *See, e.g., Chute*, 887 N.W.2d at 841; *State v. Kronzer*, No. A12-0400, 2012 WL 6652596, at *2 (Minn. Ct. App. Dec. 24, 2012); *State v. Hopkins*, No. C9-02-1334, 2003 WL 347574, at *1 (Minn. Ct. App. Feb. 18, 2003).

141. *Chute*, 908 N.W.2d at 586 (citing *State v. Jenkins*, 782 N.W.2d 211, 223 (Minn. 2010)) ("Because the district court's finding that Chute granted the public an implied license to access his land by using this dirt driveway is supported by the record, it is not clearly erroneous.").

142. *See id.*

143. *Id.* ("The scope of the implied license 'is limited not only to a particular area but also to a specific purpose.'" (quoting *Florida v. Jardines*, 569 U.S. 1, 9 (2013))).

144. *See id.* at 586–87 ("Based on the evidence, we conclude that the officer's intrusion violated the limitations of the implied license to enter Chute's property.").

145. *See id.* at 587 ("Anyone observing the officer's actions objectively would conclude that his purpose was not to question the resident of the house, but to inspect the camper, 'which is not what anyone would think he had license to do.'" (quoting *Jardines*, 569 U.S. at 10)).

146. *State v. Chute*, 887 N.W.2d 834, 841 (Minn. Ct. App. 2016) (quoting *State v. Brist*, 812 N.W.2d 51, 54 (Minn. 2012)), *aff'd*, 908 N.W.2d 578 (Minn. 2018).

application of the United States Constitution,” as long as the U.S. Supreme Court rulings are “on point.”¹⁴⁷ By affirming the Minnesota Court of Appeals and further applying *Jardines*, the Minnesota Supreme Court chose to follow *Jardines* over Minnesota’s own precedent.¹⁴⁸ This approach of the Minnesota courts to follow the U.S. Supreme Court’s precedent when it comes to concerns under the Constitution seems prudent on its face. After all, the Supremacy Clause of the Constitution, in conjunction with *Marbury v. Madison*, vests in the U.S. Supreme Court the right to interpret the Constitution and bind the state courts accordingly.¹⁴⁹ Because the notion of suppressing evidence obtained through unreasonable searches originates from the exclusionary rule,¹⁵⁰ which vindicates a criminal defendant’s Fourth Amendment rights, it would seem apt to follow the U.S. Supreme Court on matters related to the exclusionary rule.

Most recently, however, the U.S. Supreme Court, and specifically Justice Thomas, in *Collins v. Virginia*, called into question the “Court’s authority to impose [the exclusionary] rule on the States.”¹⁵¹ Although Justice Thomas agreed with the majority’s holding that the automobile exception to a warrantless search does not apply when the vehicle is within the curtilage,¹⁵² he noted that the exclusionary rule “is not ‘a personal constitutional right.’”¹⁵³ Justice Thomas explained that “the exclusionary rule is a ‘judicially created’ doctrine

147. *Brist*, 812 N.W.2d at 54 (citations omitted) (“We have therefore recognized that, when we consider matters arising under the United States Constitution, we are bound to apply Supreme Court decisions that are on point and are good law.”).

148. See discussion *infra* Section IV.B.

149. See U.S. CONST. art. VI, cl. 2; *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

150. See discussion *supra* Section II.A.

151. 138 S. Ct. 1663, 1675 (2018) (Thomas, J., concurring).

152. See *id.* at 1667. Because of the “ready mobility” of automobiles, obtaining a warrant for the search of a vehicle may not be feasible in all circumstances. See *id.* at 1669 (quoting *California v. Carney*, 471 U.S. 386, 390 (1985)). As a result, the automobile exception provides that “the search of an automobile can be reasonable without a warrant.” *Id.* In *Collins*, the officer had “searched [a] motorcycle, [which] was parked inside a partially enclosed top portion of the driveway” adjoining defendant’s house. *Id.* at 1667. The Court held that because the officer had no license to access the enclosed portion of the driveway with the garage and the parked motorcycle, his search of the motorcycle occurred within the curtilage of the home, where the automobile exception did not apply. See *id.* at 1670–72.

153. *Id.* at 1677 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

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that is ‘prudential rather than constitutionally mandated.’”¹⁵⁴ Further, he clarified that the exclusionary rule is federal common law because it is “not grounded in the Constitution or a federal statute” and is, therefore, not binding on the states under the Supremacy Clause.¹⁵⁵ While noting that there are “special enclaves of federal common law” which indeed bind state courts, Justice Thomas, supported by precedent, concluded that “the exclusionary rule does not implicate any of th[ose] special enclaves.”¹⁵⁶ Accordingly, he urged the Court to reconsider the binding nature of the federal exclusionary rule jurisprudence on state courts.¹⁵⁷

Jardines is a clear interpretation of the exclusionary rule as it examines the extent of the Fourth Amendment’s protection against unreasonable searches to suppress evidence.¹⁵⁸ However, because of the weight of precedent supporting Justice Thomas’ conclusion that the U.S. Supreme Court’s interpretation of the exclusionary rule and its caveats are not binding on state courts, the Minnesota Supreme Court may not necessarily be bound by *Jardines*. This is especially so because *Jardines* is not on point, as it is distinguishable from the circumstances of *Chute*.¹⁵⁹ More importantly, a strong and long-standing Minnesota precedent—*State v. Crea*—which is precisely on

154. *Id.* at 1678 (quoting *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 363 (1998)).

155. *Id.* (citations omitted) (“When the Supremacy Clause refers to ‘[t]he Laws of the United States made in Pursuance [of the Constitution],’ it means federal statutes, not federal common law.” (alterations in original) (quoting Michael D. Ramsey, *The Supremacy Clause, Original Meaning, and Modern Law*, 74 OHIO ST. L.J. 559, 572–599 (2013))).

156. *Id.* at 1679–80. The exclusionary rule does not fall within the special enclaves of binding federal common law because

[i]t does not govern the sovereign duties of the United States or disputes of an interstate or international character. Instead, the rule governs the methods that state police officers use to solve crime and the procedures that state courts use at criminal trials—subjects that the Federal Government generally has no power to regulate. These are not areas where federal common law can bind the States.

Id. (citing *United States v. Morrison*, 529 U.S. 598, 618 (2000); *Smith v. Phillips*, 455 U.S. 209, 221 (1982)).

157. *Id.* at 1680 (“We have not yet revisited that question in light of our modern precedents, which reject *Mapp*’s essential premise that the exclusionary rule is required by the Constitution. We should do so.”).

158. See *Florida v. Jardines*, 569 U.S. 1, 7–11 (2013).

159. See discussion *infra* Section IV.A.3.

point, was available to the court in *Chute* and should have been utilized instead.¹⁶⁰

3. *Jardines is Distinguishable from Chute*

Giving due weight to the Minnesota Supreme Court's interpretation of the exclusionary rule's binding nature and taking *Jardines* to be the controlling authority in *Chute*, the court's application of *Jardines* is still improper. This is primarily because *Jardines* is distinguishable from the case at bar.¹⁶¹ In *Jardines*, the object being searched was the actual curtilage of the defendant's home, i.e. the front porch.¹⁶² The defendant there had provided neither explicit nor implicit permission to such conduct.¹⁶³ In *Chute*, the officer searched a reportedly stolen camper, whose status as stolen was already reasonably certain to the officer.¹⁶⁴ The defendant in *Chute* had given implicit permission to the public to be on the part of the curtilage that was the driveway.¹⁶⁵ The stolen camper happened to be within the plain view of defendant's curtilage, which was impliedly open to the public.¹⁶⁶ Thus, unlike *Jardines*, the officer in *Chute* was not conducting a physical search of the defendant's curtilage.¹⁶⁷

The Court in *Jardines* ruled that an officer's entry into the curtilage exceeds the scope of the implied license when the officer's "behavior objectively reveals a purpose to conduct a search."¹⁶⁸ *Jardines*, however, did not clarify what it meant by "a search." Whether the Court meant to prohibit the search of the curtilage itself (as occurred in *Jardines*) or to articulate an overall ban on investigating any object lying in plain sight on the curtilage is not clear. Nonetheless, to elucidate the type of conduct that exceeds the implied license, the Court in *Jardines* provided some examples: "exploring the front path with a metal detector, or marching [a] bloodhound into the

160. For the discussion on the applicability of *State v. Crea*, 305 Minn. 342, 233 N.W.2d 736 (1975), to the facts of *Chute*, see discussion *infra* Section IV.C.

161. See 569 U.S. at 6.

162. *Id.*

163. *Id.*

164. *State v. Chute*, 908 N.W.2d 578, 581 (Minn. 2018).

165. *Id.* at 586.

166. See *id.*

167. See *id.* at 581.

168. *Jardines*, 569 U.S. at 10.

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garden before saying hello and asking permission.”¹⁶⁹ The Court also explained that “[c]onsent at a traffic stop to an officer’s checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics.”¹⁷⁰ The common feature connecting these examples is that the licensee has impermissibly investigated or searched only the area covered by the license. It is also reasonable to infer that, because the license-at-issue in *Jardines* covered an area where the homeowner had a reasonable expectation of privacy, i.e. the home’s curtilage, the prohibition of a search would also cover only that area.

Thus, there is not a hint from *Jardines* that investigating a stolen vehicle, to which there can be no reasonable expectation of privacy, in an area where the officer has an implied license to be, violates the scope of the implied license. The rule from *Jardines* applies neatly to *Jardines* and other scenarios where a licensee-officer conducts a search of the curtilage itself. But when applied to *Chute*, the rule must be stretched to circumstances that were not specified in its explication. Simply put, *Jardines* and *Chute* describe somewhat similar but effectively different scenarios, which makes the application of the former’s holding to the latter inapposite.

4. *The Minnesota Supreme Court Improperly Decided the Officer’s Purpose for Being on Chute’s Driveway*

Whether the officer’s behavior in *Chute* “objectively reveal[ed] a purpose to conduct a search”¹⁷¹ is contestable. As *Jardines* noted, the subjective intent of the officer is irrelevant.¹⁷² The question, then, is a factual one—whether a reasonable person, observing the officer’s actions, could conclude that the officer’s purpose was to conduct a search. Questions of fact are usually reserved for the trier of fact, which, in this case, was the district court.¹⁷³ Though the district court in *Chute* “did not expressly determine for what purpose the officer

169. See *id.* at 9.

170. *Id.*

171. *Id.* at 10.

172. *Id.*

173. *Issue of Fact (Question of Fact or Factual Issue)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk ed. 2012) (“Issues of fact are determined by the trier of fact, which in many cases is a jury. Issues of fact found at trial, particularly by a jury, are given considerable deference on appeal, being disturbed only if there is evidence of wrongdoing or mistake in the legal instructions or if the jury reaches such an absurd result that no reasonable juror could have done so.”).

entered appellant's driveway," the Minnesota Court of Appeals nonetheless deemed it prudent to conclude that "the officer entered the driveway for the purpose of conducting a search."¹⁷⁴

In doing so, the court of appeals relied on *Haase* and *Tracht* because both cases "recognized that [in Minnesota] the legitimacy of an officer's entry into the curtilage depends on his purpose for entering."¹⁷⁵ However, both *Haase* and *Tracht* are distinguishable from *Chute* because in *Chute*, the officer had no way of positively determining the identity of the camper to be the one reported stolen by B.F. without stepping onto Chute's driveway and inspecting the camper's VIN since the camper's license plate had been removed.¹⁷⁶ In both *Tracht* and *Haase*, the officers' purpose for entering the defendant's property was to talk to the defendants.¹⁷⁷ In *Chute*, the officer's purpose in approaching Chute's driveway would have been the same had the officer chosen not to take the additional, cautionary step of ensuring the camper on the driveway was, in fact, the one reported stolen.¹⁷⁸

The Minnesota Supreme Court, however, did not rely on *Tracht* or *Haase*, and used "the evidence [to] demonstrate[] that the officer's purpose for entering the curtilage was to conduct a search."¹⁷⁹ The court reasoned that because the officer first stopped to look at the

174. *State v. Chute*, 887 N.W.2d 834, 842 (Minn. Ct. App. 2016), *aff'd*, 908 N.W.2d 578 (Minn. 2018).

175. *See id.* In *Tracht*, the officer entered into a garage where a vehicle reported to have been in an accident was located. *Tracht v. Comm'r of Pub. Safety*, 592 N.W.2d 863, 864 (Minn. Ct. App. 1999). The officer could identify the vehicle as the one reported because he had the vehicle's registration, the radiator was leaking, a window was broken, and an airbag exploded. *Id.* He had no need to further examine the car—all the necessary evidence was available from a surface glance. *See id.* Similarly, in *Haase v. Comm'r of Pub. Safety*, the officer had the suspected vehicle's license plate number and registration to be able to identify it as the reported vehicle, while he was standing at the threshold of an open garage door. 679 N.W.2d 743, 745 (Minn. Ct. App. 2004).

176. *Compare Tracht*, 592 N.W.2d at 864 (explaining that the officer had the vehicle's registration and could identify the reported vehicle from signs that it had been in an accident), *and Haase*, 679 N.W.2d at 745 (explaining that the officer had the suspected vehicle's license plate number and registration to find a positive match with the reported vehicle), *with Chute*, 887 N.W.2d at 839 (explaining that the vehicle's license plate had been removed and the VIN was only partially available).

177. *See Chute*, 887 N.W.2d at 842 (discussing *Tracht*, 592 N.W.2d at 864, and *Haase*, 679 N.W.2d at 745).

178. *See supra* notes 175–177 and accompanying text.

179. *State v. Chute*, 908 N.W.2d 578, 586–87 (Minn. 2018).

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camper on the driveway before using the driveway to reach the back entrance and seek Chute, any objective viewer “would conclude that his purpose was not to question the resident of the house, but to inspect the camper.”¹⁸⁰ The court, thus, produced a “result of reasoning from the evidentiary facts”—the very definition for finding of fact—which the district court is in a better position to make.¹⁸¹ At the very beginning of the analysis section of the opinion, the Minnesota Supreme Court noted that “[w]hen reviewing a pretrial order denying a motion to suppress, we review the district court’s factual findings for clear error and its legal determinations de novo.”¹⁸² Here, however, the Minnesota Supreme Court made its own factual findings, rather than reviewing “the district court’s factual findings for clear error.”¹⁸³

The objective purpose behind the officer’s entry into Chute’s driveway was a factual matter that should have been determined by the district court, which was in a better position to make such findings of fact. Consequently, the Minnesota Supreme Court, at a minimum, should have remanded the case to the district court to make such findings in accordance with the Minnesota Supreme Court’s findings of law.

B. The Inevitable Discovery Rule as an Exception to the Purpose Limitation of an Implied License

The crux of the analysis in *Chute* is based on the Minnesota Supreme Court’s finding that the officer had exceeded the scope of his implied license to be on the defendant’s driveway.¹⁸⁴ The court held that the scope of the implied license was limited not only to the driveway’s spatial boundaries, but also by the purpose for which it was granted.¹⁸⁵ According to the court, the purpose of the implied license was limited to using the driveway to approach the back entrance of the defendant’s house.¹⁸⁶ The officer, by stopping to

180. *Id.* at 587.

181. *See Finding of fact*, BALLENTINE’S LAW DICTIONARY (3d ed. 1969) (citation omitted).

182. *Chute*, 908 N.W.2d at 583 (citing *State v. Milton*, 821 N.W.2d 789, 798 (Minn. 2012)).

183. *See id.*

184. *Id.* at 586–87 (“Based on the evidence, we conclude that the officer’s intrusion violated the limitations of the implied license to enter Chute’s property.”).

185. *Id.* at 586 (citing *Florida v. Jardines*, 569 U.S. 1, 9 (2013)).

186. *Id.* at 586–87.

investigate the stolen camper on the driveway, had exceeded this purpose limitation of the license.¹⁸⁷ As a result, the officer's investigation of the camper was unreasonable, and evidence obtained from the investigation was inadmissible.¹⁸⁸ The majority's reasoning seems sound and complete when viewed within the narrow scheme of the purpose limitation to an implied license.

There is, however, reason to question the completeness of the court's analysis. In *Chute*, the court failed to address the inevitable discovery rule in assessing the inadmissibility of the evidence obtained by the officer's search.¹⁸⁹ The inevitable discovery rule allows for the admission of evidence obtained unlawfully, when the evidence would have been discovered even in the absence of unlawful police conduct.¹⁹⁰ The discovery of evidence, in that case, is inevitable and thus admissible. The inevitable discovery rule—as an exception to the exclusionary rule—has been adopted in Minnesota as well¹⁹¹

187. *Id.* at 587.

188. *Id.* at 588.

189. *Id.* However, the Court in *Chute* may have been justified in not addressing the inevitable discovery doctrine. The issue of whether the evidence of the stolen camper would have been discovered without the officer's unlawful presence in *Chute*'s driveway was not raised by either party. And traditionally, it has been the case that "[a]n appellate court decides only the issues presented by the parties." *Hampton v. Superior Court of L.A. Cty.*, 242 P.2d 1, 3 (Cal. 1952). Since an appellate court, like the Minnesota Court of Appeals, is generally limited in its authority to review matters and legal issues beyond the record, it may have been reasonable for the Minnesota Supreme Court to not review the issue of inevitable discovery in *Chute*.

190. The seminal case, adopting and applying the inevitable discovery doctrine, is *Nix v. Williams*, 467 U.S. 431 (1984). In *Nix*, the police had elicited a confession from the defendant regarding the location of his murdered victim's body, without the presence of defendant's counsel, thereby violating the defendant's Sixth Amendment right to counsel. *Id.* at 435–36. Because the confession was obtained in an unlawful manner, the defendant sought to suppress its evidence. *Id.* at 436–37. There was, however, a large search party already looking for the victim's body. *Id.* at 435–36. Accordingly, the Court found that the location of the body would have been inevitably discovered, even without the defendant's confession, and thus, the evidence of the confession and its fruits were admissible. *Id.* at 449–50.

191. See, e.g., *State v. Licari*, 659 N.W.2d 243, 255–56 (Minn. 2003) (admitting evidence obtained from the warrantless search of defendant's storage unit because the weight of other evidence against the defendant would have inevitably granted the officer a search warrant for the storage unit); *State v. Harris*, 590 N.W.2d 90, 105 (Minn. 1999) (recognizing an exception to the exclusionary rule when evidence of marijuana obtained from searching the inside of defendant's jacket sleeve, as opposed to a proper, "protective outer-clothing pat-down search," was inevitably discoverable from the "totality of the circumstances," that is, "when 'the police would have obtained the evidence if no misconduct had taken place'" (citations omitted)); *In re*

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because “exclusion of evidence that would inevitably have been discovered would put the prosecution in a worse position,”¹⁹² which is not the intent of the exclusionary rule.

To obtain the benefits of the inevitable discovery doctrine, the prosecution must “establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means.”¹⁹³ Courts must apply the inevitable discovery rule narrowly so that it “involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment.”¹⁹⁴ In *Chute*, the court would not have had to speculate too much to find that the stolen nature of the camper was inevitably discoverable from the historical facts.

First, the owner of the camper, B.F., had already reasonably identified that the camper on Chute’s driveway was B.F.’s stolen camper, even before the officer’s unlawful investigation.¹⁹⁵ The officer, at that point, could have lawfully obtained a warrant for the search of the camper because he could establish probable cause from B.F.’s verification.¹⁹⁶ In that case, the search of the camper, which

Welfare of J.W.K., 583 N.W.2d 752, 757 (Minn. 1998) (“[A]pplication of the inevitable exception discovery precludes the suppression of the [evidence]”); *Tracht v. Comm’r of Pub. Safety*, 592 N.W.2d 863, 865 (Minn. Ct. App. 1999) (finding that evidence of the defendant’s intoxication, even if obtained unlawfully, “would have [been] inevitably discovered[,] . . . resulting in [defendant’s] arrest for DWI and the revocation of his driver’s license”).

192. *Welfare of J.W.K.*, 583 N.W.2d at 756.

193. *Nix*, 467 U.S. at 444. Minnesota also recognizes the preponderance-of-the-evidence standard-of-proof—the burden of which is borne by prosecution—for satisfying the inevitable-discovery exception to the exclusionary rule. *See Licari*, 659 N.W.2d at 254 (“If the state can establish by a preponderance of the evidence that the fruits of a challenged search ‘ultimately or inevitably would have been discovered by lawful means,’ then the seized evidence is admissible even if the search violated the warrant requirement.” (quoting *Nix*, 467 U.S. at 444)); *see also* *State v. Sherman*, No. A13-0080, 2014 WL 349643, at *1, *4 (Minn. Ct. App. Feb. 3, 2014) (same); *Tracht*, 592 N.W.2d at 866 (“Respondent Commissioner of Public Safety has the burden of proving that the inevitable discovery exception applies.” (citing *State v. Bauman*, 586 N.W.2d 416, 423 (Minn. Ct. App. 1998), *review denied* (Minn. Jan. 27, 1999))).

194. *Licari*, 659 N.W.2d at 254 (quoting *Nix*, 467 U.S. at 444–45 n.5).

195. *State v. Chute*, 908 N.W.2d 578, 581 (Minn. 2018).

196. *See id.* The officer would have had probable cause to obtain a search warrant because the camper spotted by B.F. on Chute’s driveway “matched the description of the stolen trailer in the police report made at the time of the theft.” *Id.* More importantly, B.F. later reported it to the police and “testified that he could recognize the camper from County Road D because he could see a series of bolts that he had installed along the rear overhang of the roof when making repairs on the camper.” *Id.*

would inevitably reveal that it was stolen, would have been entirely lawful.

Second, the facts suggest that Chute would have complied and assisted the officer with the search, which would have inevitably led to the discovery of B.F.'s stolen camper. Chute had already consented to a search of his home and garage after speaking with the officer, even though he was storing B.F.'s stolen property in those locations.¹⁹⁷ It would not have been speculative for the court to find that Chute also would have allowed the officer to search the camper had the officer presented himself with or without a warrant.¹⁹⁸ The court's treatment of the historical facts would have likely been sufficient at this point, and it would not need to assess whether the officer acted in good faith in searching the camper without a warrant.¹⁹⁹

Nevertheless, the fact that the issue of inevitable discovery was not raised in either of the lower courts leads a concerned observer to question if it would have been proper for the Minnesota Supreme Court to have raised the issue *sua sponte*. This concern regarding the *sua sponte* consideration of an issue by an appellate court is not entirely without support.²⁰⁰ In Minnesota, however, appellate courts have brought up the applicability of the inevitable discovery rule on their own.²⁰¹ For example, in *State v. Licari*, the Minnesota Supreme Court recognized that "issues that are raised for the first time on

197. See *id.* at 581–82.

198. See *id.*

199. See *Nix*, 467 U.S. at 445 ("The requirement that the prosecution must prove the absence of bad faith . . . would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. Of course, that view would put the police in a *worse* position than they would have been in if no unlawful conduct had transpired. . . . Nothing in this Court's prior holdings supports any such formalistic, pointless, and punitive approach."); *Chute*, 908 N.W.2d at 583.

200. See generally Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 *FORDHAM L. REV.* 477 (1958) (exploring the history and tradition of instances and reasons for appellate courts raising issues *sua sponte* and arguing that appellate courts reviewing issues not raised by litigants or lower courts may not always be outside the court's authority, despite the general rule against such *sua sponte* consideration).

201. See *State v. Licari*, 659 N.W.2d 243, 255–56 (Minn. 2003); *State v. Sherman*, No. A13-0080, 2014 WL 349643, at *4 n.3 (Minn. Ct. App. Feb. 3, 2014) ("In this case, the district court raised the inevitable-discovery doctrine *sua sponte* and ruled in the state's favor."). Although in *Sherman*, it was the district court, and not the appellate court, that addressed the inevitable discovery doctrine *sua sponte*, it still serves as an example of a court being able to raise issues unaddressed by litigants on its own.

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appeal” may be heard and addressed by the appellate body “when the interests of justice require their consideration and addressing them would not work an unfair surprise on a party.”²⁰² Although the court in *Licari* addressed the issue of unlawfully-obtained evidence being inevitably discovered for the first time on appeal, the issue was nonetheless raised by a party in the litigation, i.e. the state, and not entirely sua sponte by the court.²⁰³ The Minnesota Supreme Court in *Licari* decided to remand the case on the issue of inevitable discovery, among others, because there were “legal issues suggested by th[e] record but not addressed by the district court” and “the gravity of the offense charged” called for further findings by the district court.²⁰⁴ Similarly, in *Chute*, there were legal issues, namely, the inevitable discovery exception, that the record suggested but the district court had not addressed.²⁰⁵ Although the offense charged in *Chute* was not as grave as murder (the charge in *Licari*),²⁰⁶ it would not be an onerous burden on the district court to have the case remanded on the issue of inevitable discovery.

Furthermore, a majority of state courts have held, to varying degrees, that they have the authority to address the issue of an important exception like the inevitable discovery doctrine sua sponte.²⁰⁷ The general consensus among these state courts is that if

202. *Licari*, 659 N.W.2d at 256 (quoting *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989)). In *Licari*, the Minnesota Supreme Court addressed the issue of inevitable discovery for the first time on appeal while recognizing that “the state may have waived an argument that would otherwise support an order denying a motion to suppress evidence if the argument requires a factual record and the state failed to develop that record at the omnibus hearing.” *Id.* at 255–56 (citing *Garza v. State*, 632 N.W.2d 633, 637 (Minn. 2001)).

203. *See id.* at 250.

204. *Id.* at 256.

205. *See supra* text accompanying notes 194–98.

206. *Licari*, 659 N.W.2d at 246.

207. *See, e.g.,* *People v. Hicks*, 539 N.E.2d 756, 762 (Ill. Ct. App. 1989) (“[T]he trial judge here did not improperly act as a prosecutor when he sua sponte raised the issue of inevitable discovery.”); *Elliott v. State*, 10 A.3d 761, 775, 777–78 (Md. 2010) (holding that if there is evidence relating to inevitable discovery in the record, and the appellate court’s inquiry of the issue would not be speculative, then the court may apply the doctrine sua sponte); *Lacey v. State*, 389 P.3d 233, 238 (Mont. 2017) (“Noting that we could apply the inevitable discovery exception sua sponte—‘provided there is a sufficient record’” (citation omitted)); *Guthrie v. Weber*, 767 N.W.2d 539, 548 (S.D. 2009) (“Based on our review of the case law and the intent behind the inevitable discovery doctrine, we conclude that a court’s sua sponte ruling that evidence would inevitably have been discovered is proper only when there is no

there is sufficient evidence in the record to support inevitable discovery, and it would not be unfairly prejudicial for the court to raise the issue for the first time on appeal or otherwise, then a court may sua sponte apply the inevitable discovery doctrine.²⁰⁸ Since Minnesota has adopted the inevitable discovery doctrine and allows for sua sponte consideration of the issue by the court, the *Chute* court should have allowed prosecution to show inevitable discovery by a preponderance of the evidence, given the sufficiency of the historical facts on record.

C. *Chute* Departs from Prior Minnesota Precedence

Although both the majority and dissent in *Chute* chose to focus on scrutinizing whether Chute's driveway fell within the curtilage of his home, this case could have readily followed the precedent set in *Crea*.²⁰⁹ The *Chute* majority used *Crea* to support the conviction that the driveway of a house is within its curtilage but failed to include in its discussion that in *Crea*, the Minnesota Supreme Court found the police's entry into the driveway to conduct a search of the stolen snowmobiles, without a warrant, entirely permissible.²¹⁰ Although the dissent recognized, in a footnote,²¹¹ *Crea*'s holding of permitting officers to "keep their eyes open" when officers are in an area "impliedly open to use by the public,"²¹² most of the dissent's argument was, nonetheless, focused on applying the *Dunn* factors to find the driveway was not curtilage.²¹³

The facts of *Crea* are strikingly similar to the facts here.²¹⁴ While in *Crea*, the Minnesota Supreme Court found defendant's driveway to

other evidence that could be offered to defeat the theory."); State v. Winterstein, 220 P.3d 1226, 1230 (Wash. 2009) ("[T]he Court of Appeals at oral argument raised the issue of inevitable discovery sua sponte.").

208. See cases cited *supra* note 207.

209. See *Chute*, 908 N.W.2d at 583-92; State v. Crea, 305 Minn. 342, 346, 233 N.W.2d 736, 739-40 (1975).

210. Compare *Chute*, 908 N.W.2d at 584, 587, with *Crea*, 305 Minn. at 346, 233 N.W.2d at 739-40.

211. *Chute*, 908 N.W.2d at 589 n.1 (McKeig, J., dissenting).

212. *Crea*, 305 Minn. at 346, 233 N.W.2d at 739 (as quoted in *Chute*, 908 N.W.2d at 589 n.1).

213. See *Chute*, 908 N.W.2d at 588-92 (McKeig, J., dissenting).

214. See 305 Minn. at 343-45, 233 N.W.2d at 738-39. In *Crea*, the officers were responding to reports of some snowmobiles being stolen. *Id.* They were able to locate the house where the snowmobiles were reportedly being stored. *Id.* When they reached the house, the officers, without a warrant, walked down the driveway and

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be within the curtilage of his house, the court did not use the curtilage determination to limit the officers' authority to examine snowmobiles on the driveway since the driveway was impliedly open to the public.²¹⁵ Applying *Crea* to the facts of *Chute*, the court could have easily found Chute's driveway to have been curtilage—thereby protecting him from a physical search of the driveway—without prohibiting the police from examining the camper, which was within plain sight and did not require the police to intrude into any other part of Chute's property.

Absent an explanation of how *Jardines* affects Minnesota's case precedence, specifically *Crea* and *Krech*, the majority's focus on *Jardines*'s purpose limitation of an implied license is misplaced.²¹⁶ Without explicitly overturning *Crea* because of the U.S. Supreme Court's decision in *Jardines*, it was improper for the court in *Chute* to neglect applying *Crea* when the facts of *Crea* and *Chute* were so similar. *State v. Crea*, which is still good law in Minnesota,²¹⁷ should

saw two snowmobile trailers in front of a detached garage and behind the house. *Id.* They examined the area and found snowmobiles tracks in the snow leading to the basement. *Id.* Consequently, the officers went to the house and obtained consent to search from defendant. *Id.* The court held that the officers had the right to walk on the driveway to examine the trailers, which were in plain sight, since the driveway was part of the curtilage, which was impliedly open to the public. 305 Minn. at 342, 233 N.W.2d at 736.

215. See 305 Minn. at 342, 233 N.W.2d at 736.

216. *Chute*, 908 N.W.2d at 589 n.1 (McKeig, J., dissenting) ("Thus, under *Krech* and *Crea*, the key inquiry is whether the area in question is 'an area impliedly open to use by the public'—in which case investigative behavior is theoretically permissible—not whether an area is within the curtilage. Because these cases set only *spatial* limitations on the implied license to enter the curtilage and suggest that there are no *purpose* limitations on the license, they may require reconsideration in light of *Jardines*." (citing *Krech*, 403 N.W.2d 634, *Crea*, 305 Minn. 342, 233 N.W.2d 736; *Jardines*, 569 U.S. 1)).

217. For recent Minnesota cases still following *State v. Crea*, 305 Minn. 342, 233 N.W.2d 736 (1975), see: *State v. Higgins*, No. A14-1000, 2015 WL 5194079, at *4 (Minn. Ct. App. Sep. 8, 2015) (citing *Crea*, 305 Minn. at 343–44, 346, 233 N.W.2d at 738, 739) (finding that because the defendant could not have a reasonable expectation of privacy in his abandoned garbage bags, regardless of whether they were on the driveway, the search of the garbage bags was not unconstitutional) ("Accordingly, we do not agree that driveways have been deemed curtilage as a matter of law."); *State v. Kronzer*, No. A12-0400, 2012 WL 6652596, at *2 (Minn. Ct. App. Dec. 24, 2012) ("Courts have held that police with legitimate business may enter the areas of the curtilage which are impliedly open to use by the public. . . . and in such a situation the police are free to keep their eyes open and use their other senses." (quoting *Crea*, 305 Minn. at 346, 233 N.W.2d at 739)); *State v. Elam*, No. A08-0422,

control. In *State v. Higgins*, the Minnesota Court of Appeals specifically upheld the parts of *Crea* which directly correlate to *Chute*: police officers “walking onto the driveway and their examination of the trailers which were in plain sight.”²¹⁸ Similarly, the court of appeals, in *State v. Elam*, chose to uphold the validity of warrantless searches on impliedly-open areas like driveways, when the specific facts of the case matched those of *Crea*’s, while abrogating *Crea*’s broad authorization of warrantless searches on the curtilage.²¹⁹

Thus, if the facts and circumstances of a case, like *Chute*, narrowly match that of *Crea*’s, Minnesota courts are bound by *Crea*’s ruling. Because, under the reasonable-expectation-of-privacy standard, *Chute* could not have a legitimate expectation of privacy in the driveway that was implicitly open to the public,²²⁰ absent an express abrogation of *Crea*, the search of the stolen camper on *Chute*’s driveway was proper.

D. *Chute*’s Impact on Future Decisions

The *Chute* decision requires officers to not keep their senses open while being lawfully on land where they have a probable cause to suspect criminal activity.²²¹ By requiring officers with more than probable cause to first seek the homeowner—when the suspected object is within the officers’ plain sight on land impliedly open to the public—the court’s decision will cause impractical delays and, worse, trigger the exclusionary rule under the Fourth Amendment.²²²

2009 WL 234136, at *3 (Minn. Ct. App. Feb. 3, 2009) (citing *Crea*, 305 Minn. at 346, 233 N.W.2d at 739; *State v. Carter*, 569 N.W.2d 169, 178 n.15 (Minn. 1997)) (abrogating *Crea*’s three-part test for validating a warrantless search while still holding that “areas of curtilage that are impliedly open to public use, such as driveways and porches, may be searched without a warrant because they do not offer a person a reasonable expectation of privacy”).

218. See *Higgins*, 2015 WL 5194079, at *4 (“We do not read *Crea* to be so broad as to mean that every part of every driveway is considered curtilage. Instead, the supreme court’s discussion in *Crea* is limited to those specific facts.”).

219. See *Elam*, 2009 WL 234136, at *3.

220. See *Chute*, 908 N.W.2d at 591 (McKeig, J., dissenting).

221. See *id.* at 588.

222. With the *Chute* decision, evidence that could have nonetheless been obtained without the unlawful search now has to be suppressed because of *Chute*’s broad conception of an unreasonable search. Under *Nix v. Williams*, if the evidence obtained in the unlawful search would almost definitely have been found eventually even without said search (inevitable discovery), the evidence may be brought forth in court. 467 U.S. 431, 441–46 (1984) (holding that as long as police have not acted in

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Whenever the exclusionary rule is triggered, the inevitable social costs of suppression come along with it, and courts must engage in a time-consuming, cost-benefit analysis of suppressing the evidence.²²³ Even though the exclusionary rule is meant to deter police misconduct, there are many instances of the rule's application where police officers act in good faith, but the economic and social impact of the exclusionary rule goes unchecked.²²⁴

By expanding the reach of the exclusionary rule, the *Chute* decision deviates from the policy behind the rule²²⁵ and creates unreasonable difficulties for law enforcement officers and prosecutors in conducting (what would have otherwise been) lawful searches. The reasoning of *Chute* also makes it difficult for future

bad faith in conducting an unlawful search, the inevitable discovery exception to the exclusionary rule applies).

223. See *Davis v. United States*, 564 U.S. 229, 237 (2011) ("The analysis must also account for the 'substantial social costs' generated by the rule. Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." (citations omitted)). See generally Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937 (1983) (arguing for the need to find an alternative to the exclusionary rule).

224. See Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 592–607, 617–30 (2013).

A study of lost arrests in California from 1976 through 1979 by the National Institute of Justice found that 6% of arrestee releases by the police were due to search and seizure problems, 4.8% of all felony arrests were rejected by prosecutors because of search and seizure problems, and 3.7% of felony dismissals at the court level were due to search and seizure problems. In narcotics cases, where the exclusionary rule has its greatest impact, approximately 30% of felony drug arrests were rejected due to search and seizure problems.

Id. at 597–98 (footnotes and citations omitted).

225. See *United States v. Leon*, 468 U.S. 897, 919–20 (1984) ("In short, where the officer's conduct is objectively reasonable, 'excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that ... the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.'" (quoting *Stone v. Powell*, 428 U.S. 465, 539–40 (1976) (White, J., dissenting))); *United States v. Peltier*, 422 U.S. 531, 542 (1975) ("If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.").

courts to decide cases with similar facts to *Chute* and *Crea*, as the two decisions come to different conclusions for very similar facts. More importantly, Justice Cardozo's fear that the criminal will go free because of a police officer's procedural blunder, made under circumstances uncommon to the average person, is exacerbated by the Minnesota Supreme Court's ruling in *Chute*.²²⁶

V. CONCLUSION

The question before the Minnesota Supreme Court was complex in that it required the court to delineate the scope of the curtilage exception to the open-fields doctrine when a police officer has probable cause to examine a reportedly stolen object, identified as such by the owner, on said property.²²⁷ Although the lengths to which the majority and dissent went to properly analyze the application of the *Dunn* factors was admirable, both missed the opportunity to examine more deeply the scope of an implied license on a quasi-open part of a property's curtilage.²²⁸ The court also passed on an opportune occasion where it could have settled the status of *State v. Crea* as the authoritative Minnesota precedent on evidence obtained from an impliedly open driveway. As a result, the majority's decision contradicts prior precedent²²⁹ and creates new difficulties for prosecution, even when the evidence is within plain sight.

226. See *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

227. See *State v. Chute*, 908 N.W.2d 578, 583–88 (Minn. 2018).

228. See *id.* at 583–92.

229. See *State v. Crea*, 305 Minn. 342, 233 N.W.2d 736 (1975).

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